Igiro v Republic (Criminal Appeal 41 of 2022)
[2023] KECA 926 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 926 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 41 OF 2022

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

JULY 28, 2023

BETWEEN

AMIN MOHAMED IGIRO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi delivered on 12th August 2018 by Hon W. Korir in High Court Criminal Appeal No 28 of 2016) (Original Kilifi SPM Criminal Case SO 55 of 2014)

JUDGMENT

1. The appellant herein was charged in Kilifi SPM Criminal Case SO 55 of 2014 and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. After hearing the prosecution case, the appellant was placed on his defence, was consequently convicted and sentenced to life imprisonment. The appellant's appeal to the High Court in High Court Criminal Appeal No 28 of 2016 similarly unsuccessful following its dismissal by W Korir, J (as he then was). Undeterred the appellant moved this court in the present appeal challenging the said decision.

2. Being a second appeal our mandate is limited by section 361(1) (a) of the *Criminal Procedure Code* to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal and concurrent findings arrived at, unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this court to interfere. In such appeals, this court therefore has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings, in which event, the decision is bad in law, thus entitling this court to

interfere. See *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007; *Njoroge v Republic* [1982] KLR 388; and *Karani vs R* [2010] 1 KLR 73.

3. It is clear that there is a duty imposed on the first appellate court of re-evaluating and re-analysing the evidence placed before the trial court and arrive at its decision cautious of the fact that it was not the trial court and therefore, unlike the trial court had no benefit of seeing the witness testify hence incapacitated in terms of gauging the demeanour of the witnesses and allowance must be given for this. See *Okeno vs Republic* [1972] EA 32.

4. However, the failure by the first appellate court to undertake that duty, a duty imposed by the law, elevates the otherwise factual matters to a matter of law. This court therefore held in *Jonas Akuno O'kubasu v Republic* [2000] eKLR that:

> "It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles." [Emphasis ours].

5. At times, where the question involved is that of mixed fact and law, it is not easy to distinguish the two. The Supreme Court therefore clarified what constitutes "matters of law" in relation to this court's jurisdiction as the second appellate court, in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR where the three elements of the phrase "matters of law" were identified thus:

> "a. the technical element: involving the interpretation of a constitutional or statutory provision;
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> b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record; and
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> c. the evidentiary element: involving the evaluation of the conclusions of a trial court on the basis of the evidence on record."

6. Our determination of this appeal must therefore be based on the above principles and we shall briefly revisit the facts of the case purely to satisfy ourselves whether the two courts below carried out their legal mandate as is required of them.

7. The prosecution's case was that in the month of May, 2013, when the complainant, who was living with his grandmother and an uncle went to [Particulars Withheld] Mosque, the appellant, a neighbour mixed some white powdered substance with mnazi (palm wine) which he forced the complainant to take. The appellant then gave the complainant bhang (cannabis) as a result of which the complainant felt dizzy and warned the complainant not to disclose the occurrence to anyone. The appellant then undressed the complainant and inserted his penis in the complainant's anus. Thereafter, the appellant repeatedly sodomised the complainant. However due to threats by the appellant to harm him, the complainant neither screamed nor disclosed the incident.

8. On January 26, 2014 when the complainant refused to attend madrassa, PW2, AF, the complainant's cousin, sought to know from him why he did not do so and the complainant informed him that he was in pain. By then PW2 had received reports that the complainant had become a truant and was not going to school regularly. Upon further questioning the complainant revealed that the appellant had drugged

and sodomised him severally and the matter was then reported to the elders. Medical examination conducted on the complainant revealed that he had been penetrated in the anus. According to PW2, he was aware that the appellant was a drug addict though he was unaware if he was also of unsound mind.

9. The investigations were carried out by PW3 while PW4 exhibited the P3 form which contained the findings that the complainant had a loose sphincter and injuries to his anus though no discharge was noted. The post rape care form was also produced exhibited while the complainant's age was assessed as 8 years as at January 27, 2014.

10. When the appellant was placed on his defence, he called DW1, a Chief Registered Nurse specialising in psychiatry who examined the appellant in April, 2013 when the appellant was taken to the clinic bound in ropes on account of causing disturbances. The history given was that the appellant had a history of narcotic abuse and had been admitted in hospital due to the same. DW1 prescribed for and administered to the appellant the necessary drugs and when the appellant appeared for review before him on March 31, 2013, he was calm, though was laughing and talking to himself. Once again he was attended to and drugs administered to him. Though a date was scheduled for another visit, the appellant did not turn up. According to DW1, the appellant suffered a mental illness which makes a person relapse upon stopping medication.

11. Both the trial court and the first appellate court were satisfied that the complainant was aged 8 years; that penetration was proved; and that the perpetrator was the appellant. The first appellate court found that there was no evidence that at the time the offence was committed that appellant was suffering from insanity and that DW1's evidence did not state that the appellant's disorder would cause the appellant not to know the nature and quality of his act. According to the first appellate court, since the sentence meted was the mandatory one prescribed by the law, there was no error in imposing the life sentence hence the dismissal of the appeal in its entirety.

12. This appeal was argued before us on March 15, 2023 on the court's virtual platform during which the appellant appeared virtually from Malindi Prison while the respondent was represented by Mr Mwangi Kamanu, Learned Senior Prosecution Counsel. Both the appellant and Mr Kamanu wholly adopted their written submissions save for minor highlighting.

13. The grounds of this second appeal were that the prosecution case was marred with contradictions; that section 163(1)(c) of the *Evidence Act* was not considered; that the age of the complainant was not proven; that the appellant's defence was not considered; and that the imposition of the minimum mandatory sentence under section 8(2) of the *Sexual Offences Act*, violated articles 25(a)(c) and 27(1)(2)(4) of the *Constitution*. It was sought that the conviction be quashed and the sentence set aside.

14. It was submitted that there was variation in the description of the appellant's house thereby casting doubt in the prosecution case; that there was contradiction in the evidence whether drugs were found in the mosque or in the appellant's house; and that the prosecution evidence was not corroborated and therefore going by the case of *Joan Chebich Sawe v R* (2003) eKLR, his conviction was not justified.

15. On the allegation of the failure to conduct investigation, it was pointed out that PW3 confirmed that she did not visit Sakina mosque and since she was not the investigating officer, her evidence ought not to be relied upon hence the appellant's conviction was unsafe based on the case of *Rose Auma Otana v R* (2011) eKLR.

16. On the issue of legality of sentence, the appellant urged that the mandatory minimum sentence is unfair, discriminatory and unconstitutional. Cited were the cases of *Eliud Waweru Wambui v R* Cr Appeal 102 of 2016; *MMI v R* (2022) eKLR, *Rophas Furaha Ngombo v R* Criminal Appeal 42 of 2018

and *Raphael Mutinga Mutinda v R* (2019) eKLR and it was submitted that the time served ought to be considered as per section 333(2) of the *Criminal Procedure Code*.

17. In opposing the appeal, the respondent submitted that the age assessment of the victim was proof of his age; that penetration was proven vide medical evidence of PW4 and that the appellant was recognized by PW1 as a neighbour. On the legality of sentence, it was emphasized that by dint of section 8(2) of the *Sexual Offences Act* the life imprisonment was within the law and that the directions of the Supreme Court on July 6, 2021 in the Muruatetu 2 case clarified this.

Analysis and Determination

18. We have considered the appeal and the submissions. As we stated at the beginning of this judgement, this court's jurisdiction on second appeal is limited to matters of law. In this case, it is contended that the learned judge erred in upholding the trial court's decision in light of the sharp contradictions and invariances (sic) in the prosecution's case. An issue as to whether there are contradictions or not cannot be the basis of a second appeal where those contradictions have been reconciled by both the trial court and the first appellate court and a concurrent decision arrived at thereon. In our view, where prosecution witnesses have given conflicting versions of material facts in issue, the trial judge before whom such evidence is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any of the evidence before it. See *Onubugu vs State* 119741 9 SC1 *Kem vs State* (1985)1 NWLR.

19. However, where there are material contradictions in the evidence before the trial court, and in re-evaluating the evidence the first appellate court fails to reconcile them, the failure to do so, in our view, is a matter of law. This is so because the failure to reconcile such inconsistencies may be evidence of the failure to subject the evidence to a thorough, exhaustive and independent re-evaluation, which is a duty imposed by law on the first appellate court. See *John Mutua Munyoki vs Republic* [2017] eKLR.

20. We must however emphasize that as was done by this court in *Benjamin Mbugua Gitau vs Republic* [2011] eKLR that:

> "It must be stated that there is no set format to a re- evaluation of evidence by the first appellate court should conform. We adopt what was stated by the Supreme Court of Uganda in the case of Uganda Breweries Ltd v Uganda Railways Corporation, thus: "The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first appellate court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:
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> 'I would accept Mr Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re- evaluation should conform. A first appellate court is expected to scruitinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'
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> In Odongo and another v Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki JSC (as he then was) said: "While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

21. In the appellant's submissions, he seems to be questioning the veracity of the complainant's evidence. What the appellant calls contradictions are in fact inconsistencies in the complainant's evidence. The first appellate court in its judgement noted that:

> " The substances that elicited a state of dizziness, drowsiness, sleep or stupor on PW1 were administered, whether or not it occurred at the house, compound or mosque. PW3 testified that on the day of filing the report with the police PW1 appeared drowsy corroborating PW1's evidence that sleep or stupor inducing substances had been given to him."

22. It is clear that the learned judge was well aware of the allegation of inconsistency in the evidence of PW1 and addressed it. In those circumstances, we cannot interfere with his finding on that issue.

23. It was further submitted that in the absence of corroborating evidence either from the scene or from other independent witnesses, the prosecution's case was based on mere speculations. It was further contended that the investigating officer was not competent to carry out the investigations. Suffice it to say that the two courts below considered the evidence adduced and were satisfied that it was sufficient to prove the prosecution's case. It must be noted that the prosecution's case was never controverted as the appellant did not give evidence. However, the evidence adduced by DW1 was adequately considered particularly by the first appellate court and we have no basis for interfering with his findings.

24. As regards the legality of the sentence, we note that the trial court imposed the life sentence merely because, according to it, that was the prescribed sentence. No mitigation was taken and considered. The trial court noted that the appellant did not offer any mitigation. The first appellate court also seems to have been swayed by the same view.

25. This court in Malindi Criminal Appeal No 12 of 2021 - *Julius Kitsao Manyeso v Republic* expressed itself on the imposition of life sentence:

> " We are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others vs The United Kingdom (Application nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

26. This court further noted that the question of whether the indeterminate life sentence was unconstitutional was raised in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, and the Supreme Court recommended to the Attorney General and Parliament to commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'. No concrete step seems to have been taken toward that direction notwithstanding the evident injustice that the lack of clarity as to what constitutes "life sentence" is causing to those facing that indeterminate sentence, if sentence it might be called.

27. The Supreme Court in in *Francis Karioko Muruatetu & another v Republic* (*supra*) concluded that:

> "We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism."

28. Guided by the Supreme Court decision, this court in *Julius Kitsao Manyeso v Republic* (*supra*) found that it has the discretion to interfere with the life sentence.

29. Since the life sentence in this case was not an exercise of judicial discretion but an imposition or implementation of legislative fiat, we find that the sentence was not judicially imposed. We set aside the same and substitute therefore a sentence of 35 years imprisonment.

30. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR